No. 96-1581

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

STATE OF SOUTH DAKOTA,
Petitioner,
v.
YANKTON SIOUX TRIBE, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF AMICI CURIAE OF STANDING ROCK SIOUX TRIBE AND ASSINIBOINE AND SIOUX TRIBES OF THE FORT PECK RESERVATION IN SUPPORT OF RESPONDENT YANKTON SIOUX TRIBE

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INTEREST OF AMICI CURIAE [1]

Amici are federally recognized Indian tribes, each with a Reservation that was allotted and opened to non-Indian homesteaders by Congress. Act of May 30, 1908, c. 237, 35 Stat. 558 (Fort Peck); Act of May 29, 1908, c. 218, 35 Stat. 460 (Standing Rock); Act of February 14, 1913,

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[1] Pursuant to Rule 37.6 of the Rules of this Court, counsel for Amici states that no counsel for a party authored this brief in whole or part, and that no person or entity other than Amici and their counsel made any monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief amici curiae, and those consents have been filed with the Clerk.

c. 54, 37 Stat. 675 (Standing Rock). Amici have an interest in the proper development and application of the law relating to disestablishment.

SUMMARY OF ARGUMENT

1. The Agreement of December 31, 1892 between the Yankton Sioux Tribe and the United States, ratified by the Act of August 15, 1894, c. 290, 28 Stat. 286, 314, contains language not found in *any* other surplus land agreement or Act. Article XVIII of the Yankton Agreement and Act provides that the Treaty of April 19, 1858—which established the Reservation boundaries—shall be "in full force and effect, the same as though this agreement had not been made." Among the dozens of surplus land Acts enacted to further its now repudiated allotment policy, Congress used this language only once: in the 1894 Yankton Act. This unique savings clause must be given effect—it must not be read as surplusage, or as no different in meaning from the qualified savings clauses Congress used in many other surplus land Acts. Rather, the 1894 Act should be construed, consistent with Article XVIII and the Act as a whole, to preserve the Reservation's boundaries.

2. To the extent the Court finds tension between Article XVIII and other provisions in the 1894 Act, the conflict must be resolved in favor of continuing the Reservation boundaries as defined in the 1858 Treaty. *County of Yakima v. Confederated Tribes of the Yakima Indian Nation*, 502 U.S. 251, 269 (1992); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247-48 (1985); *Washington v. Washington Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 690 (1979).

3. The negotiations between the Yankton Sioux Tribe and the United States, the legislative history of the 1894 Act, and the executive branch implementation of the Act contain no statements indicating an intent to change reservation boundaries. During the negotiations leading to

the 1892 Agreement, the Yanktons were reassured that "there is no cause for apprehension that this agreement will in any way interfere with the treaty of 1858." Similarly, nothing in the congressional reports or debate on the 1894 Act suggests any change in reservation boundaries. And, in implementing the Act, President Cleveland proclaimed "[l]ands within the Yankton Reservation" opened to settlement. Thus, the circumstances surrounding the 1894 Act support continuation of the Reservation boundaries, not disestablishment.

ARGUMENT

I. THE PROVISIONS OF THE 1892 AGREEMENT AND 1894 ACT PRESERVED THE BOUNDARIES OF THE YANKTON SIOUX RESERVATION.

The question presented in this case is whether the Agreement of December 31, 1892 between the Yankton Sioux Tribe and the United States ("1892 Agreement"), ratified by the Act of August 15, 1894, c. 290, 28 Stat. 286, 314 ("1894 Act"), effected a change in the boundaries of the Yankton Sioux Reservation in South Dakota. Neither the 1892 Agreement nor the 1894 Act even mentions, much less speaks directly to, any intent of the United States or the Tribe to disestablish the Reservation.[2] Nor can an intent to alter the Reservation's boundaries properly be implied, as we discuss below.

Several dozen Indian reservations—including those of *Amici* tribes—were allotted and opened to non-Indian homesteaders in the three decades after the Indian General Allotment Act of 1887, 25 U.S.C. §§ 331-355. The six reservation boundary cases this Court has decided over the

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[2] Both parties to this Agreement—the Tribe and the United States—are before the Court taking the position that there was no change in reservation boundaries. *See Restatement 2d of Contracts*, § 201(1) (1981) ("where the parties have attached the same meaning to a promise or agreement . . . it is interpreted in accordance with that meaning.").

last 35 years have created "a fairly clean analytic structure" for distinguishing those surplus land Acts that altered reservation boundaries from those Acts that simply offered non-Indians the opportunity to purchase lands not allotted to Indians within established reservation boundaries. *Solem v. Bartlett*, 465 U.S. 463, 470 (1984); *see Hagen v. Utah*, 510 U.S. 399, 410-11 (1994); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977); *DeCoteau v. District County Court*, 420 U.S. 425 (1975); *Mattz v. Arnett*, 412 U.S. 481 (1973); *Seymour v. Superintendent*, 368 U.S. 351 (1962). The Court has declared that the most probative evidence of whether diminishment has occurred is the statutory language used to open the Indian lands. *Hagen*, 510 U.S. at 411; *Solem*, 465 U.S. at 470. But, the Court has not previously had occasion to consider the statutory language that Congress enacted in the 1894 Yankton Act, and nowhere else.

A. The language of the Agreement and Act does not support a holding of disestablishment.

1. *The Article XVIII Savings Clause.*

The 1894 Act ratifies a unique savings clause—Article XVIII—which provides:

> Nothing in this agreement shall be construed to abrogate the treaty of April 19th, 1858, between the Yankton tribe of Sioux Indians and the United States. And after the signing of this agreement, and its ratification by Congress, *all provisions of the said treaty of April 19th, 1858, shall be in full force and effect, the same as though this agreement had not been made,* and the said Yankton Indians shall continue to receive their annuities under the said treaty of April 19th, 1858.

28 Stat. 318 (emphasis added). The 1858 Treaty in Article I established the boundaries of the Yankton Sioux Reservation. Treaty of April 19, 1858, 11 Stat. 286. The 1894 Act, by declaring that all provisions of that Treaty "shall be in full force and effect, the same as though this

agreement had not been made" (Article XVIII), on its face preserved the integrity and continued existence of those boundaries.

No other surplus land Act contains a savings clause like Article XVIII of the 1894 Act—stating *without any qualification* that *all* provisions of a prior treaty "shall be in full force and effect, the same as though this agreement had not been made. . . ." 28 Stat. 318.[3] The three surplus land Acts at issue in *Rosebud*, for example, recite that nothing therein "shall be construed to deprive the said Indians of the Rosebud Reservation, South Dakota, of any *benefits to which they are entitled under existing treaties or agreements, not inconsistent with the provisions of this agreement*."[4] This was the most common language where Congress used a savings clause, as fifteen other agreements ratified by Congress had savings clauses preserving former treaty provisions, but only to the extent those provisions were not "inconsistent" with the provisions of the agreement.[5] Four agreements had savings

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[3] Counsel for *Amici* Tribes have reviewed the surplus land Acts adopted after the 1887 General Allotment Act, 24 Stat. 388, 25 U.S.C. §§ 331-355 as set forth in Kappler, *Indian Affairs, Laws and Treaties* (Vols. I, III).

[4] Act of April 23, 1904, c. 1484, 33 Stat. 254, 255 (art. V) (emphasis added); *see* Act of March 2, 1907, c. 2536, 34 Stat. 1230, 1232 § 8; Act of May 30, 1910, c. 260, 36 Stat. 448, 452 § 11 (art. XI).

[5] Act of August 14, 1894, c. 290, 28 Stat. 286, 326 § 16 (art. XI) (Nez Perce); Act of July 1, 1898, c. 542, 30 Stat. 567, 569 (Seminole); Act of June 6, 1900, c. 813, 31 Stat. 672, 674 (art. VI) (Fort Hall); Act of March 1, 1901, c. 676, 31 Stat. 861, 872 § 44 (Creek); Act of July 1, 1902, c. 1375 32 Stat. 716,727 § 73 (Cherokee); Act of February 20, 1904, c. 161, 33 Stat. 46, 49 (art. V) (Red Lake); Act of April 27, 1904, c. 1620, 33 Stat. 319 (Sisseton); Act of April 28, 1904, c. 1820, 33 Stat. 567 (art. IV) (Grande Ronde); Act of March 3, 1905, c. 1452, 33 Stat. 1016 (art. XI) (Wind River); Act of March 3, 1905, c. 1479, 33 Stat. 1048, 1079, § 6 (art. III) (Port Madison); Act of May 29, 1908 c. 217, 35 Stat. 458 § 7 (Spokane); Act of May 29, 1908, c. 218, 35 Stat. 460,

clauses preserving treaty provisions not "in conflict" or "not affected by" the provisions of the subsequent agreement.[6] Three more had other limited savings clauses, also unlike that in the Yankton Agreement.[7]

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§ 9 (Cheyenne River and Standing Rock); Act of May 27, 1910, c. 257, 36 Stat. 440, 443 § 11 (Pine Ridge); Act of June 1, 1910, c. 264, 36 Stat. 455, 459 § 14 (Fort Berthold); Act of Feb. 14, 1913, c. 54, 37 Stat. 675, 678 § 10 (Standing Rock).

Among the numerous savings clauses enacted by Congress, the State relies on but two, both relating to the Crow Tribe, Act of April 11, 1882, c. 74, 22 Stat. 42 and Act of March 3, 1891, c. 543, 36 Stat. 989, 1039-42, § 31. Brief of Petitioner State of South Dakota (hereafter "State Br.") at 26-27. Neither of these Acts contains the language included in the Yankton Agreement and Act—as neither provides that all treaty provisions shall be in effect "the same as though this agreement had not been made." Moreover, this Court did *not* rely on or even discuss these provisions in *Montana v. United States*, 450 U.S. 544 (1981), or *DeCoteau*, 420 U.S. 425, the cases cited by the State. Finally, a 1904 Crow Act contains a very different savings clause, preserving earlier treaty provisions "not inconsistent with" the 1904 Act and expressly stipulating that all provisions of earlier treaties "inconsistent herewith are hereby repealed." Act of April 27, 1904, c. 1624, 33 Stat. 352, 355 (art. VI). Whatever the original meaning of the 1882 and 1891 Crow savings provisions, to the extent they purported to preserve reservation boundaries inconsistent with the 1904 Act, those earlier savings clauses have been repealed.

[6] Act of March 1, 1889, c. 317, 25 Stat. 757 (art. V) (Muscogee); Act of March 2, 1889, c. 405, 25 Stat. 888, 896, § 19 (Sioux Nation); Act of June 10, 1896, c. 398, 29 Stat. 321, 353 § 9 (art. IX (Blackfeet); Act of June 10 1896, c. 398, 29 Stat. 321, 352 § 8 (art. VIII) (Fort Belknap).

[7] Act of March 1, 1889, c. 317, 25 Stat. 757 (Creek) ('no treaty or agreement heretofore made and now subsisting is hereby affected, except so far as the provisions of this agreement supersede and control the same"); Act of March 3, 1893, c. 209, 27 Stat. 612, 644 § 12 (Pawnee) (agreement does not "repeal, modify or change any treaty stipulations now in force between the United States and said . . . tribe . . ., except in the manner and to the extent herein expressly or by necessary implication provided for."); Act of February 13, 1891, c. 165, 26 Stat. 749 (art. VIII) (Iowa) ("nothing herein contained shall in any manner affect" claims against the United States, interests in land outside of Indian territory, or annuity payments). The Iowa Agreement called for the allotment and opening to homesteaders of lands of the Iowa Tribe in the Territory of Oklahoma (formerly Indian territory). The savings clause language was limited to land "outside of Indian territory." *Id.* By its terms, the savings clause had no application to the lands being allotted to Indians or opened to settlers.

The Yankton savings clause is thus unique, sweeping and unequivocal. Indeed, as the court below correctly pointed out, *no* other surplus land Act contains language preserving prior rights and interests as "strong" as Article XVIII. *Yankton Sioux Tribe v. Southern Missouri Waste Dist.*, 99 F.3d 1439, 1477 (8th Cir. 1996). Congress could certainly have enacted a more limited savings clause, as it did in numerous other surplus land Acts. Or Congress could have enacted no savings clause at all, as it did in the vast majority of surplus land Acts,[8] including four

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[8] Act of Jan. 26, 1887, c. 47, 24 Stat. 367 (Iowa); Act of May 1, 1888, c. 213, 25 Stat. 113 (Gros Ventre, Piegan Blood, Blackfeet, and River Crow); Act of July 4, 1888, c. 519, 25 Stat. 240 (Winnebago); Act of Jan. 14, 1889, c. 24, 25 Stat. 642 (Chippewa); Act of Feb. 23, 1889, c. 203, 25 Stat. 687 (Shoshones, Bannocks and Sheepeaters), Act of Mar. 2, 1889, c. 391, 25 Stat. 871 (Flathead); Act of March 2, 1889, c. 405, 25 Stat. 888 (Sioux); Act of Mar. 2, 1889, c. 421, 25 Stat. 1012 (Pipestone); Act of Mar. 2, 1889, c. 422, 25 Stat. 1013 (Peorias, Miamis); Act of Oct. 1, 1890, c. 1271, 26 Stat. 658 (Round Valley); Act of Jan. 12, 1891, c. 65, 26 Stat. 712 (Mission Indians); Act of Mar. 3, 1891, c. 543, 26 Stat. 989, 1026 (Couer d'Alene); Act of Mar. 3, 1891, c. 543, 26 Stat. 989, 1032 (Fort Berthold); Act of March 3, 1891, 26 Stat. 989, 1035 (Sisseton); Act of June 17, 1892, c. 120, 27 Stat. 52 (Klamath); Act of July 1, 1892, c. 140, 27 Stat. 62 (Colville); Act of July 13, 1892, c. 164, 27 Stat. 136 (Spokane); Act of Feb. 20, 1893, c. 147, 27 Stat. 469 (White Mountain Apache); Act of Mar. 3, 1893, c. 203, 27 Stat. 557 (Kickapoo); Act of Mar. 3, 1893, c. 209, 27 Stat. 612, 633 (Puyallup); Act of Mar. 3, 1893, c. 209, 27 Stat. 612, 640 (Cherokee); Act of Mar. 3, 1893, c. 209, 27 Stat. 612, 644 (Tonkawa); Act of Mar. 3, 1893, c. 209, 27 Stat. 612, 644 (Pawnee); Act of Mar. 3, 1893, c. 209, 27 Stat. 645 (Cherokee); Act of Aug. 15, 1894, c. 290, 28 Stat. 286, 320 (Yakima); Act of Aug. 15, 1894, c. 290, 28 Stat. 286, 296 (Sac and Fox); Act of Aug. 15, 1894, c. 290, 28 Stat. 286, 301 (Wyandote); Act of Aug. 15, 1894, c. 290, 28 Stat.

286, 323 (Alsea); Act of Feb. 20, 1895, c. 113, 28 Stat. 677 (Southern Ute); Act of Feb. 20, 1895, c. 114, 28 Stat. 679 (Winnebago); Act of Mar. 2, 1895, c. 188, 28 Stat. 876, 894 (San Carlos); Act of Mar. 2, 1895, c. 188, 28 Stat. 876, 902 (Otoe); Act of Mar. 2, 1895, c. 188, 28 Stat. 876, 907 (Quapaw); Act of Mar. 2, 1895, c. 188, 28 Stat. 876, 895 (Witchita); Act of Mar. 2, 1895, c. 188, 28 Stat. 876, 909 (Potawatomi); Act of June 7, 1897, c. 31, 30 Stat. 62, 87 (Uncompahgre-Utes); Act of June 7, 1897, c. 31, 30 Stat. 62, 92 (Chippewa); Act of June 4, 1898, c. 376, 30 Stat. 429 (Uintah); Act of June 28, 1898, c. 517, 30 Stat. 495 (Choctaw, Chickasaw); Act of June 28, 1898, c. 517, 30 Stat. 495, 500 (Muscogee-Creek); Act of July 1, 1898, c. 545, 30 Stat. 571 (Colville); Act of Feb. 28, 1899, c. 222, 30 Stat. 909 (Pottawatomie, Kickapoo); Act of Mar. 3, 1899, c. 450, 30 Stat. 1362 (Lower Brule, Rosebud); Act of June 6, 1900, c. 813, 31 Stat. 672, 677 (Comanche), Kiowa, Apache); Act of June 6, 1900, c. 813, 31 Stat. 672 (Shoshone); Act of Feb. 11, 1901, c. 350, 31 Stat. 766 (Bad River); Act of May 27, 1902, c. 888, 32 Stat. 245 (Mission Indians); Act of May 27, 1902, c. 888, 32 Stat. 245 (Klamath); Act of May 27, 1902, c. 888, 32 Stat. 245 (Paiute); Act of May 27, 1902, c. 888, 32 Stat. 245, 263 (Uintah); Act of July 1, 1902, c. 1361, 32 Stat. 636 (Kaw); Act of July 1, 1902, c. 1362, 32 Stat. 641 (Choctaw, Chickasaw); Act of Feb. 3, 1903, c. 399, 32 Stat. 795 (Lac Courte Oreille, Lac du Flambeau); Act of Mar. 3, 1903, c. 994, 32 Stat. 982 (Chippewa); Act of Apr. 21, 1904, c. 1402, 33 Stat. 189, 194 (Chippewa); Act of Apr. 21, 1904, 33 Stat. 189, 217 (Ponca); Act of Apr. 23, 1904, c. 1495, 33 Stat. 302 (Flathead); Act of Apr. 28, 1904, c. 1786, 33 Stat. 539 (White Earth); Act of Dec. 21, 1904, c. 22, 33 Stat. 595 (Yakima); Act of Feb. 8, 1904, c. 553, 33 Stat. 706 (Wailaki); Act of Mar. 3, 1905, c. 1479, 33 Stat. 1048, 1069 (Utes); Act of Mar. 3, 1905, c. 1479, 33 Stat. 1071 (Five Civilized Tribes); Act of Mar. 20, 1906, c. 1125, 34 Stat. 80 (Kiowa, Comanche, and Apache); Act of Mar. 22, 1906, c. 1126, 34 Stat. 80 (Colville); Act of Apr. 21, 1906, c. 1645, 34 Stat. 124 (Lower Brule); Act of Apr. 26, 1906, c. 1876, 34 Stat. 137 (Five Civilized Tribes); Act of June 5, 1906, c. 2580, 34 Stat. 213 (Kiowa, Comanche, Apache); Act of June 21, 1906, c. 3504, 34 Stat. 325, 335 (Couer d'Alene); Act of June 21, 1906, c. 3504, 34 Stat. 325, 360 (Sioux); Act of June 21, 1906, c. 3504, 34 Stat. 325, 382 (Stockbridge); Act of June 28, 1906, c. 372, 34 Stat. 539 (Osage); Act of Mar. 1, 1907, c. 2285, 34 Stat. 1015, 1021 (Mogui); Act of Mar. 1, 1907, c. 2285, 34 Stat. 1015, 1042 (Sioux); Act of Mar. 4, 1907, c. 2933, 34 Stat. 1413 (Apache); Act of May 30, 1908, c. 237, 35 Stat. 558 (Fort Peck); Act of June 25, 1910, c. 431, 36 Stat. 855, 861 (Kiowa); Act of Mar. 3, 1911, c. 210, 36 Stat. 1063 (Yuma); Act of Mar. 3, 1911, c. 210, 36 Stat. 1063, 1069 (Kiowa); Act of Mar. 4, 1911, c. 246, 36 Stat. 1345 (Hoh); Act of May 11, 1912, c. 121, 37 Stat. 111 (Omaha).

considered by this Court in prior disestablishment cases.[9] But Congress chose neither such course—instead enacting special language in the Yankton Act.

Precisely because it is different, Article XVIII must not be construed to have the same meaning as narrower savings clauses Congress used elsewhere. As the Court determined in *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83, 101 (1991):

> [I]t is not our function to eliminate clearly expressed inconsistency of policy and to treat alike subjects that different Congresses have chosen to treat differently. The facile attribution of congressional 'forgetfulness' cannot justify such a usurpation. Where what is at issue is not a contradictory disposition within the same enactment, but merely a difference between the more parsimonious policy of an earlier enactment and the more generous policy of a later one, there is no more basis for saying that the earlier Congress forgot than for saying that the earlier Congress felt differently. In such circumstances, the attribution of forgetfulness rests in reality upon the judge's assessment that the later statute contains the *better* disposition. But that is not for judges to prescribe.

As *Casey* teaches, this Court's role is to give effect to the language Congress enacted, not to presume that differences in related statutes were inadvertent or unintentional. That

[9] *Hagen*, 510 U.S. 399 (1994); *DeCoteau*, 420 U.S. 425 (1975); *Mattz*, 412 U.S. 481 (1973); *Seymour*, 368 U.S. 351 (1962). The presence of a limited savings clause, or no savings clause at all, is not inconsistent with finding continued Reservation boundaries on other grounds. This Court has found Reservations not to be disestablished in both situations. *See Solem*, 465 U.S. 463 (limited savings clause); *Seymour*, 364 U.S. 351 (no savings clause). Here, where Congress enacted an unequivocal savings clause, the basis for finding no disestablishment is all the more clear, as we discuss below.

principle applies here. The Yankton savings clause is plainly different from the savings clauses at issue in, for example, *Rosebud*, and should not be presumed to have the same meaning.[10]

The State argues that Article XVIII merely preserved annuities guaranteed in the 1858 Treaty. State Br. at 21. But Congress knew how to preserve "benefits" from treaties—such as annuities—when that was its objective. *E.g.*, Act of April 23, 1904, c. 1484, 33 Stat. 254, 255 (art. V) (Article V of the September 14, 1901 Agreement, at issue, in *Rosebud*, 430 U.S. 584). That is not what Congress did in Article XVIII.

Moreover, Article XVIII of the Yankton Agreement has two separate clauses, one continuing annuities and the other continuing in full force and effect "all provisions of the said treaty of April 19th, 1858." Thus, the State's position requires this Court to find 1) that Congress in Article XVIII used different language than it used in other savings clauses, but intended no difference in meaning, and 2) that Congress included two clauses in Article XVIII, but intended only one of them (dealing with annuities) to have any meaning at all. This Court should not, we submit, attribute to Congress either an inability to distinguish between various savings clauses it enacts, or an intent to include language devoid of meaning.

Instead, Article XVIII should be construed to do what it says—to preserve the provisions of the 1858 Treaty. To be sure, Articles I and II of the Act provide for the sale of unallotted lands—something not contemplated in the 1858 Treaty. But, apart from these provisions by which Congress *specifically* effected a land transfer, Article XVIII maintains the 1858 Treaty provisions intact. In other words, in the absence of a specific directive by Congress in the Act, Article XVIII should *not* be construed by

[10] *See Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 131-35 (1989) (treaty provision different from related provisions should not be construed as drafting error).

inference or implication to deprive the Tribe of its Treaty protected rights.

Among the core rights protected by the 1858 Treaty is the Tribe's right to its Reservation, within boundaries defined by the Treaty. Since no language in the Act by its terms purports to alter the Reservation boundaries, Article XVIII maintains those 1858 boundaries. This reading of the Act harmonizes its provisions—implementing the specific land purchase provided in Articles I and II, while at the same time giving life to the general principle that Article XVIII preserves the terms of the 1858 Treaty.

2. *The Article I Cession and the Article II Payment.*

Article I of the 1892 Agreement recited that the Yankton Sioux Indians "hereby cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands within the limits of the reservation," 28 Stat. 286, 314. Article II of the 1892 Agreement stipulated that the United States would make a $600,000 lump sum payment for the unallotted Yankton Sioux lands. *Id.* at 315. While this Court has referred to language of cession and sum-certain payment provisions as creating "an almost insurmountable presumption" of disestablishment, it did so in the context of a surplus land Act that did *not* have a broad savings clause like Article XVIII of the Yankton Agreement. *Solem*, 465 U.S. at 470-71 (1984). Article XVIII, by its express terms, makes any presumption of disestablishment unavailable.

In *DeCoteau*, this Court held that an 1889 Agreement containing language of cession and requiring payment of a sum certain by the United States disestablished the Sisseton Wahpeton Reservation. *DeCoteau*, 420 U.S. 425 (1975). A fundamental difference between the 1889 Sisseton Wahpeton Agreement and the 1892 Yankton Agreement is that the Sisseton Wahpeton Agreement had no savings clause, while the Yankton Agreement had an

unequivocal savings clause. The fact that Congress considered these two Reservations so close in time—with the Sisseton Wahpeton Agreement ratified in 1891 and the Yankton Agreement ratified in 1894—underscores the importance of giving effect to the savings clause in the Yankton Agreement. Congress should not be viewed as having disestablished the Sisseton Wahpeton Reservation in 1891, and then be deemed to have added different language, but to have intended the same result, with regard to the Yankton Reservation in 1894. Rather, the inclusion of Article XVIII in the Yankton Agreement indicates a change from Sisseton Wahpeton, and a continuation of the Reservation boundaries at Yankton.

3. *Other Provisions.*

Other provisions in the 1892 Agreement and 1894 Act support continued Reservation status. Article XVII permanently prohibited liquor sales on the lands ceded under the Agreement, or "upon any *other lands within or comprising the reservations of the Yankton Sioux or Dakota Indians* . . . ." 28 Stat. 286, 318 (emphasis added). This language states clearly that the Yankton Reservation was preserved—as the provision refers to the "reservations" [11] and indicates that the lands ceded are included among lands "within or comprising the reservations"—not some category of former reservation land. The Court should not construe Article XVII to delete the word "other"—as the State's position would require. Rather, the clear reference to the continuing existence of the Reservation in the 1892 Agreement and 1894 Act must be given effect.[12]

[11] The reference to "reservations" is to the Yankton Sioux Reservation that is the subject of this case, and the Pipestone Reservation referred to in Article XVI of the Agreement.

[12] The Petitioner argues that Article XVII raises a presumption of disestablishment since making the ceded lands subject to federal liquor laws would be "surplusage" if those lands remained part of "Indian country" and thus already subject to such laws. Stat. Br. at 17-19. But as this Court pointed out in *Solem*, 465 U.S. at 468, at the time of the Agreement Indian country was understood to exclude lands held by non-Indians, even if located within reservation boundaries, so inclusion of liquor controls merely reflected the parties' intent to carry out the Tribe's express wish for continued prohibition throughout the area, whether Indian or non-Indian owned. S. Exec. Doc. No. 27, 53d Cong., 2d Sess. (1894) (hereafter "Negotiations") at 21. In any event, whatever Congress in 1894 understood to be the law regarding liquor in Indian country, certainly it knew what was meant by using the term "reservation" in the Act.

See also Article I (cession of lands "within the limits of the reservation"); Article XIII (assuring peaceable possession of allotments "on the reservation").

Article VIII of the 1892 Agreement provided that "[s]uch . . . lands hereby ceded and sold to the United States, as may now be occupied by the United States for agency, schools, and other purposes, shall be reserved from sale to settlers until they are no longer required for such purposes." 28 Stat. 286, 316. In construing a similar provision in a surplus land Act regarding the Cheyenne River and Standing Rock Reservations, Act of May 29, 1908, c. 218, 35 Stat. 460, this Court stated that "[i]t is difficult to imagine why Congress would have reserved lands for such purposes if it did not anticipate that the opened area would remain part of the reservation." *Solem*, 465 U.S. at 474. Article VIII, therefore, supports the proposition that Congress did not intend in 1894 to abrogate the reservation boundaries.[13]

[13] Similarly, Articles IV and V provided that most of the monies paid to the Tribe should be held in a fund and paid out "for the benefit of the Tribe in such manner as the Secretary of the Interior shall determine," for purposes such as "schools," "courts of justice and other local institutions for the benefit of the Tribe." Article V also provided for congressional appropriations for these purposes of "an amount equal to or greater than" the monies expended from the fund. Article V, Section 2 provided that the fund should be distributed only when the "Indians shall have received a complete (fee) title to their allotted lands." These articles contemplated a continuing federal responsibility, and, like Article VIII, are consistent with continued reservation existence.

The State relies on the provision in the 1894 Act which reserves the 16th and 36th sections in each township for common school purposes, arguing that this provision indicates that the ceded lands no longer were part of an Indian reservation. State Br. at 19-20. If the ceded lands no longer were part of an Indian reservation, however, this provision and, in particular, the clause making the school lands "subject to the laws of the State of South Dakota" would be surplusage since the State already had a right to sections 16 and 36 in each township for school purposes under its Enabling Act of February 22, 1889, c. 180, 25 Stat. 676, and the school lands outside an Indian reservation automatically would be subject to its laws. It should not be assumed that Congress intended a change in reservation boundaries by virtue of a school lands provision that would be superfluous if disestablishment was to occur. In any event, this Court has warned that school lands provisions are "suspect" as "independent evidence of a Congressional intent to diminish." *Solem*, 465 U.S. at 475 n.18.

B. Any ambiguity in the Agreement and Act must be resolved in favor of continued existence of the Reservation.

Assuming *arguendo* that the language of Article XVIII and the 1894 Act as a whole is not clear, it is well settled that when this Court interprets provisions of statutes claimed to alter Indian treaties, it invokes the longstanding rule that "legal ambiguities are resolved to the benefit of the Indians." *DeCoteau*, 420 U.S. at 447; *Hagen*, 510 U.S. at 411; *see also Carpenter v. Shaw*, 280 U.S. 363, 367 (1930). This canon of construction is "rooted in the unique trust relationship between the United States and the Indians." *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985); *see also Washington v. Washington Commercial Passenger Fishing Vessel Ass'n.*, 443 U.S. 658, 675 (1979). This Court has explained that when considering surplus land Acts, "[d]iminishment . . . will not be lightly inferred," *Solem*, 465 U.S. at 470; *Hagen*, 510 U.S. at 411, and that, in this context, the principle of construing ambiguities for the benefit of the Indians must be given "the broadest possible scope." *DeCoteau*, 420 U.S. at 447.

This canon of construction is not simply a default principle or a tie-breaker rule. Rather, it expresses a powerful rule of public policy central to our political system.[14] Basic to our constitutional system is the principle that government can operate only with consent of the governed. Indians were initially incorporated into the American political system through treaties like the 1858 Yankton Sioux Treaty, in which tribes gave their assent on behalf of their members to that incorporation and to subjecting themselves to the overriding power of Congress.[15] For this reason, treaties like the 1858 Yankton Sioux Treaty are fundamental documents setting forth the terms of the political relationship between tribes and the United States, much like the Constitution sets forth the terms of the political relationship between states and the United States.[16] Thus, this canon of construction expresses the rule that the original intent of treaties by which tribes gave consent to political incorporation into the United States ought to be preserved unless a subsequent statute "plainly" and "unambiguously" altered the treaty. *E.g.*, *Oneida*, 470 U.S. at 247-48.

This principle has been at the heart of this Court's Indian jurisprudence from the beginning. In *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832) this Court held that the Cherokee Nation's right to self-government was not divested, despite Treaty language giving Congress the right of "managing all their affairs." *Worcester*, 31 U.S.

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[14] *See generally* Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism and Interpretation in Federal Indian Law*, 107 *Harv. L. Rev.* 381, 413-19 (1993).

[15] *See generally* Richard B. Collins, *Indian Consent to American Government*, 31 *Ariz. L. Rev.* 365 (1989).

[16] *See* Frickey, 107 *Harv. L. Rev.* at 413-19, 426-29.

at 553. The Court held that had the Treaty intended the Cherokees to lose their governmental authority, "it would have been openly avowed." *Id.* at 554; *see also Ex parte Crow Dog*, 109 U.S. 556 (1883) (statute authorizing Congress to "secure to . . . [the Tribe] an orderly government" construed not to remove tribal self-government). This principle of safeguarding tribal rights against all but the most explicit actions by Congress "has been recognized, without exception, for more than a hundred years." *Choate v. Trapp*, 224 U.S. 665, 675 (1912).

This Court continues to apply this canon strictly. In *County of Yakima v. Confederated Tribes of the Yakima Indian Nation*, 502 U.S. 251 (1992), Justice Scalia, speaking for the Court, declared:

> When we are faced with these two possible constructions, our choice between them must be dictated by a principle deeply rooted in this Court's Indian jurisprudence: "[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." Montana v. Blackfeet Tribe, 471 U.S. at 766. See also McClanahan v. Arizona State Tax Comm'n, 411 U.S. at 174.

Id. at 269; *see also United States v. Dion*, 476 U.S. 734, 738 (1986); *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 412 (1968).

At a minimum, the Article XVIII savings clause, and the other provisions discussed above, make untenable the position that the 1892 Agreement and 1894 Act constitute "clear," "plain" and "unambiguous" Congressional intent to abrogate Indian treaty rights defining the boundaries of the Yankton Sioux Reservation. So, should this Court see any tension between Article XVIII and other provisions of the 1892 Agreement, the canons of construction mandate that the Agreement be construed to preserve the Reservation's boundaries.

II. EVENTS SURROUNDING EXECUTION AND RATIFICATION OF THE 1892 AGREEMENT SHOW NO INTENT TO DISESTABLISH THE YANKTON SIOUX RESERVATION.

This Court has noted that "[w]hen events surrounding the passage of a surplus land Act—particularly the manner in which the transaction was negotiated with the tribes involved and the tenor of legislative Reports presented to Congress—unequivocally reveal a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation," the Court has been willing to find that Congress intended to diminish a reservation. *Solem*, 465 U.S. at 471. But, no such unequivocal understanding existed in this case. To the contrary, contemporaneous statements by Congress and the Executive officers responsible for implementing the 1894 Act indicate that the Yankton Sioux Reservation survived unchanged.

A. Congress expressed continued Reservation existence.

As noted above, Congress in the 1894 Act itself referred to the Yankton Reservation as having continued vitality. Congress did so again less than two years later, by enacting a measure granting to "all settlers who made settlement under the homestead laws upon lands *in the Yankton Indian Reservation* . . ." a leave of absence for one year.[17] Act of February 26, 1896, c. 31, 29 Stat. 16 (emphasis added). Moreover, the same 1896 Act, in a separate section, extended for one year the time for proof and payment by settlers under the homestead laws "upon any lands of any former Indian reservation in the State of South Dakota." *Id.* at § 3. Thus, Congress in 1896 both referred to the lands sold by virtue of the 1894 Yank-

[17] By contrast, Congress in a statute enacted one year after the first Rosebud opening statute described the homesteaded lands as "lands which were heretofore a part of the Rosebud Reservation." 33 Stat. 700, quoted in *Rosebud*, 430 U.S. at 603 n.25.

ton Act as an ongoing "Reservation," and used completely different language when referring to lands of any "former Indian reservation." As this Court observed in *Solem*, 465 U.S. at 471, "Congress' own treatment of the affected areas, particularly in the years immediately following the opening," has value in determining Congress' intentions as to disestablishment. The clear statutory references in 1894 and 1896 to the Yankton "Reservation" are significant reflections of Congressional intent.

B. Statements and actions by executive officers contemporaneous with the Agreement and Act support the continued existence of the Reservation.

In his Proclamation of May 16, 1895, 29 Stat. 865, opening the Yankton Sioux Reservation to settlement under the 1894 Act, President Cleveland declared that the lands so opened were described in a "Schedule of Lands *within the Yankton Reservation*, South Dakota . . . ." (emphasis added). By contrast, President Theodore Roosevelt's Proclamation opening the lands in *Rosebud* contained no such reference to the "Reservation," and indeed constituted an "unambiguous, contemporaneous statement by the Nation's Chief Executive of a perceived disestablishment" which strongly evidenced an intent by Congress to change reservation boundaries. *Rosebud*, 430 U.S. at 602-03. President Cleveland's statement regarding the "Yankton Reservation" is likewise persuasive evidence of what Congress intended in the 1894 Act.

Past decisions of this Court which found reservation boundaries to be disestablished have relied on clear statements during negotiations indicating disestablishment. In some instances, the Court has referred to express statements by tribal representatives. *DeCoteau*, 420 U.S. at 433 ("[w]e never thought to keep this reservation for our lifetime"); *id.* at 435 n.16 ("[w]e can buy for ourselves what we need if payment is made in cash, and then we do not care to have an agency here after the surplus lands

have been sold"). The Court in *Hagen*, 510 U.S. 399 (1994), relied upon the explanation made by the negotiator for the United States to the Indians that "congress has provided legislation which will pull up the nails which hold down that [reservation boundary] line and *after next year there will be no outside boundary line to this reservation.*" *Id.* at 417 (citations omitted). The Court viewed this statement as reflecting "the contemporaneous understanding" conveyed to the Indians that the Reservation would be diminished.[18]

There is no evidence in the negotiations with the Yankton of any such contemporaneous understanding. To the contrary, the Commissioners who negotiated the 1892 Agreement for the United States, when forwarding the Agreement to Congress, wrote about "the settlement and improvement *of the reservation* by white people . . . ." Negotiations at 18 (emphasis added). Likewise, John P. Williamson, a missionary and advisor to the Yankton, wrote "I have read the agreement you present the Yankton Indians . . . I can say to the Indians that I believe the terms of this agreement are the most liberal that could be granted them at this time . . . And further there is no cause for apprehension that this agreement will in any way interfere with the treaty of 1858." Negotiations at 84.[19] These statements inform the contemporaneous understand-

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[18] Similarly, in *Rosebud*, the Government's Inspector McLaughlin, in negotiating with the Rosebud Tribe explained that "'[t]he cession of Gregory County' by ratification of the Agreement, 'will leave your reservation a compact, and almost square tract, and would leave your reservation about the size and area of Pine Ridge Reservation.'" *Rosebud*, 430 U.S. at 591-92. This Court determined that such language created "an unmistakable baseline purpose of disestablishment." *Id.*

[19] The principle that treaties and agreements are to be considered as the Indians understood them is elemental. *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970); *Tulee v. Washington*, 315 U.S. 681, 684-85 (1942); *Jones v. Meehan*, 175 U.S. 1, 11 (1899).

ing of the 1892 Agreement and stand in stark contrast to the statements made during the negotiations at issue in *DeCoteau*, *Rosebud* and *Hagen*.

C. The legislative history of the 1894 Act shows no intent to disestablish the Reservation.

The legislative history of the 1894 Act is similarly barren of any evidence of intent to change reservation boundaries.[20] When the 1892 Agreement came before Congress for ratification, the House of Representatives initially amended its terms to provide for payment to the Yankton Sioux Tribe only as portions of the unallotted lands were sold to settlers. 53 Cong. Rec. 8268 (1894). The House later reconsidered and withdrew this amendment. *Id.* at 8268-8271. Nothing in the debate gives any indication that any member of the House thought changing the method of payment had anything to do with diminishing the Reservation.[21] Direct discussion of reservation boundaries is entirely absent from the Congressional reports and debates.

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[20] During the course of debate, two Congressmen referred to placing the surplus lands in the "public domain," but it is not clear that these references were to the Yankton cession and, even if they were, this Court has held that isolated references such as this are "hardly dispositive." *Solem*, 465 U.S. at 475.

[21] Likewise, the negotiations leading to the 1892 Agreement reveal that at the outset both the Tribe and the U.S. treaty commissioners favored a cession through "appraisal and sale"—with the Indians receiving payment only from the actual proceeds. Negotiations at 77-78. The parties ultimately agreed to payment of a fixed price for a variety of reasons including certainty of amount, and ease of resale to settlers. Not a shred of evidence exists in the record of negotiations to suggest that changing from appraisal and sale to a fixed price might also lead to eliminating the Reservation boundaries. Negotiations at 75-78.

CONCLUSION

Where this Court has found that Congress disestablished a Reservation, that finding has been based on a confluence of factors—strong and consistent statutory language suited to disestablishment, surrounding circumstances providing substantial evidence of a contemporaneous understanding of disestablishment, and a pragmatic view that the area in question had in fact lost its Indian character. *See Solem*, 465 U.S. at 470-71.

In this case, none of these factors is present. The 1892 Agreement and 1894 Act contain a unique savings provision (Article XVIII), refer several times to a continuing "reservation" (Articles I, XIII and XVII), and include additional provisions reflective of continued reservation existence (Articles IV, V and VIII). Only by depriving Article XVIII of its plain meaning, and ignoring the force of Congress' own references to a continuing reservation, could the language of the Agreement and Act be viewed as consistent with disestablishment.

Moreover, the negotiations leading to the 1892 Agreement, and the legislative history of the 1894 Act, are completely devoid of the kind of statements regarding reservation boundaries that this Court has relied on in finding disestablishment in other cases. The best evidence of the contemporaneous understanding here is the use of the term "reservation" by Congress itself in the 1894 Act and again in 1896, and by the President in his proclamation opening the lands in 1895.

And finally, at Yankton, the "strong tribal presence in the opened area has continued until the present day," "the seat of the tribal government is now located there" and "most important tribal activities" and the continued operation of federal Indian programs take place there. *Solem*, 465 U.S. at 480. The ongoing presence of a significant number of tribal members and an active tribal government

on the lands at issue further supports continued reservation existence.

In short, particularly since it must "resolve any ambiguities in favor of the Indians" and "not lightly find diminishment" [22] this Court should hold that the 1894 Act did not disestablish the Yankton Sioux Reservation. The decision below should be affirmed.

Respectfully submitted,

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[22] *Hagen*, 510 U.S. at 411 (1994).